United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7531

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VINCENT J. BELLOWS,

Plaintiff-Appellee,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants-Appellants.

JOINT APPENDIX
(VOL. 1)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK



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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRY

73 Civ.1189 VINCENT J. BELLOWS VS. DENNIS DAINACK ET ANO

JUDGE LASKER

73 CIV. 1189

DATE	PROCEEDINGS	Date Order or Judgment No.
Mar.21,73	Filed Complaint and Issued Summons.	
Mar21-73	Filed ORDER designating Joseph Wasser to serve the sumons and complaint on defts. Thomas E. Andrews,Acting Clerk.	
Mar30-73	Filed summons and return served on: Brian Van Houten by Abe Smith on 3-27-73 & Dennis Dainack by Abe Smith on 3-27-73.	
Apr 23-73	Filed stip and order that the respondents' time to answer the complaint is extended to 5/4/73, So Ordered Lasker J.	LJL
May 11-73	Filed defts ANSWER to the complaint.	
2-1-74	[illegible] — Lasker J.	
10-17-75	Filed Pltff's Notice of Interrogs.	
12-17-75	Filed Defts. Notice of Motion and supporting affidavit for an order amending defts. answer. LRet: 12-30-75	
12-17-75	Filed Defts. Memorandum of Law.	
12-17-75	Filed Defts. Answer to Interrogs.	
1-9-76	Filed Memo End.on motion dtd.12-17-75.Motion granted on consent. See letter of pltffs. counsel dtd. 1-7-76. Lasker J. (mailed notice)	
03-22-76	Before Lasker,J. Jury trial begun.	
03-23-76	Trial continued & concluded. Jury verdict for Pltff.	
04-02-76	Filed Defts'. affidavit & notice of motion to set aside the jury verdict, ret. 4-15-76.	
04-13-76	Filed Pltff's. affidavit in opposition to Defts'. motion to set aside the verdict.	
04-13-76	Filed Pltff's. brief in opposition to Defts'. motion to set aside the verdict or to reduce the damages awarded.	
04-19-76	Filed Defts'. memorandum of law and reply.	
07-06-76	Filed [illegible] of record of proceedings dated March 22, 23, 1976.	
7-28-76	Filed Opinion #44870. Dfts. motion Granted for New Trial As indicated. Submit Order on Notice.....Lasker J. (M/N)	
08-17-76	Filed Order that Defts'. motion for a new trial is granted unless Pltff. will accept an award of compensatory damages against the Defts. in the amount of $4,000 and punitive damages in the amount of $3,000 against Deft. Dainick and $2,000 against Deft. Van Houten, etc.....Lasker,J. (mailed notice)	
09-14-76	Filed Pltff's. notice of acceptance of award of damages as reduced.	
10-4-76	Filed order staying judgment pending filing timely appeal and docketing thereof. Lasker	
9-22-76	Filed judgment 76,855.....ordered pltff have judgment against defts Dainack and Van Hou amt of $4,000 for compensatory damages jointly & severally; against Dainack in amt of $3,00 against Van Houten in amt of $2,000. Clerk. Approved Lasker J.	
10-15-76	3 cert. Bill of Costs for Judgment # 76,855 . Clerk.	
10-21-76	Filed notice of appeal to USCA by deft from ;the judgment of 9-22-76 of J. Lasker.	

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
- -X

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and
LESLIE VAN HOUTEN,

Defendants.
- -X

COMPLAINT

File Number

73 Civ 1189

Plaintiff, Vincent J. Bellows, by Rosen & Rosen, Esqs., his attorneys, as and for his Complaint herein, respectfully alleges:

1. That the within action is brought in this Court pursuant to Title 42 U.S.C. §1983, §1985, §1986, and the Fifth and Fourteenth Amendmendments of the Constitution of the United States.

2. That the amount in controversy exceeds Ten Thousand and 00/100 ($10,000.00) Dollars exclusive of interest and costs.

3. That heretofore and on or about the 7th of October, 1972, and within ninety (90) days after the accrual of the within claim, a notice of claim in duplicate was served on each of the defendants.

4. That at all times mentioned herein, the plaintiff was and still is a resident of the Village of Livingston Manor, County of Sullivan, State of New York within the jurisdiction of this Court.

5. Upon information and belief at all times mentioned herein the defendants were and still are employed as New York State police officers and at the time this cause of action accrued were assigned to the Ferndale Barracks of the New York State Police at Ferndale, Sullivan County, New York.

6. Upon information and belief that the defendants reside in the State of New York, within the jurisdiction of the United States District Court for the Southern District of New York.

7. That on or about the 16th day of July, 1972, at Main Street, Livingston Manor, Sullivan County, New York, the defendants, Dennis Dainack and Leslie Van Houten, New York State police officers without just cause, reason or provocation and without any warrant or judicial process, acting in concert and under color of New York State law wilfully and maliciously seized and held plaintiff prisoner and did transport him in an official New York State police car to a dark and secluded place outside of Livingston Manor,

New York, and said defendants did question plaintiff and did then and there assault and beat the plaintiff with their fists and did inflict great pain and bodily injuries upon plaintiff and during said time defendants were armed with guns; that plaintiff was helpless and unable to protect himself from the aforesaid acts of defendants; that after the plaintiff was held prisoner, questioned and assaulted as aforesaid, the defendants drove plaintiff back to Livingston Manor, New York, where plaintiff was left by said defendants in the street.

8. That no charges of any violation of any law or of any kind were made against plaintiff by said defendants before any Judge or Court.

9. That the defendants herein acting under color of New York State law and as police officers abused their authority and public trust as members of the New York State Police by seizing and holding plaintiff prisoner and questioning plaintiff without any justification therefor; and beating plaintiff at a dark and hidden place free from observation, and without any legal process or warrant for the arrest and seizure of plaintiff who had not violated any law of the State of New York or any of its municipal sub-divisions; and in failing to take plantiff before any Judge or Court, as required by New York State law; and in acting

as aforesaid violated the constitutional and civil rights of the plaintiff to due process of law and the equal protection of the law pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

10. That defendants did not permit or allow the plaintiff to call his attorney so that appropriate steps to secure plaintiff's release could be taken although plaintiff was entitled to have an attorney to represent him, and plantiff demanded that he be permitted to call his attorney.

11. That the defendants acted as aforesaid in concert and conspiracy under color of law as New York State police officers to deprive plantiff of his constitutional and civil rights to be charged before a Court or Judge and to be free from unlawful restraint and assault by defendants acting as police officers.

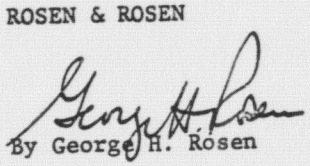
12. That all of the aforesaid acts were done without the consent of the plaintiff and despite his objections to said acts in gross disregard for the rights of the plaintiff.

13. That by reason of the aforesaid plaintiff demands judgment against the defendants for the sum of Twenty-five Thousand and 00/100 ($25,000.00) Dollars.

14. That plaintiff does further demand punitive damages against the defendants in the sum of Fifty Thousand and 00/100 ($50,000.00) Dollars and counsel fees for services in the within action.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Seventy-five Thousand and 00/100 ($75,000.00) Dollars and for counsel fees and costs.

ROSEN & ROSEN



By George H. Rosen

Attorneys for Plaintiff,
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Tel. (914) 794-7733

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT J. BELLOWS,	:	
Plaintiff,	:	AMENDED ANSWER
-against-	:	73 Civ. 1189 (MEF)
DENNIS DAINACK and "LESLIE" VAN HOUTEN,	:	
Defendants.	:	

Defendants by their attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, for their answer to the complaint:

1. Deny that this action arises under the constitution or statutes of the United States and deny that there has been any deprivation or threatened deprivation under color of any statute, ordinance, regulation, custom or usage of the State of New York of any rights, privileges or immunities secured to plaintiff by the Constitution or Statutes of the United States or the State of New York

2. Deny each and every allegation contained in paragraphs "2", "7", "9", "10", "11" and "12" of the complaint and oppose the relief sought in paragraphs "13" and "14".

FIRST AFFIRMATIVE DEFENSE

3. This Court lacks jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

4. The complaint fails to state a cause of action upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

5. At all times, the defendants were and still are State Policeman assigned to the Ferndale Barracks, Sullivan County, State of New York.

6. As such member of the New York State Police, defendants are, pursuant to Executive Law (N.Y.) § 223 empowered "to arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law..."

7. On July 16-17, 1972 the defendants did arrest or take into custody plaintiff in accordance with such power.

8. Defendants acted in good faith and had probable cause for their belief plaintiff had committed a breach of the peace or violation of law; further their actions were taken in reasonable reliance thereon and defendants believed they were acting lawfully.

9. To further show good faith when on further investigation defendants did not retain reasonable cause to believe plaintiff had committed any breach of the peace, they immediately released him without further delay as authorized and required by law. Criminal Procedure Law (N.Y.) § 140.20(4).

10. The detention or arrest, at most, amounted to ten (10) minutes and was done in good faith and reasonable belief in the lawfulness of the arrest or detention and was not done with the purpose to deprive plaintiff of any constitutional rights.

FOURTH AFFIRMATIVE DEFENSE

11. Any use of force by defendants on plaintiff was necessary, did not inflict any injury, and was applied in a good faith effort to effectuate the arrest or detention.

12. No force was applied maliciously and sadistically for the very purpose of causing harm.

13. The allegations of force do not constitute a deprivation of constitutional rights.

WHEREFORE, defendants demand judgment dismissing this action together with the costs and disbursements of this action and such other and further relief as this Court deems justified.

Dated: New York, New York
December 17, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By:

S/

A. SETH GREENWALD
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MAIL

OCT 20 1975

DEPARTMENT OF LAW
NEW YORK CITY OFFICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and LESLIE VAN HOUTEN,

Defendants.

- -x

NOTICE OF INTERROGATORIES

73 Civ. 1189

S I R :

PLEASE TAKE NOTICE, that the plaintiff hereby requests that each of the defendants, for himself, answer the within Interrogatories under oath within 20 (30) days after the service hereof; to wit:

1. That defendant, Dennis Dainack, was served with two (2) copies of the claim of plaintiff herein on October 7, 1972 at the Ferndale Barracks of the New York State Police.

2. That the defendant, LESLIE VAN HOUTEN, was served

with two (2) copies of the claim of the plaintiff herein on October 7, 1972 at the Ferndale Barracks of the New York State Police.

3. That on or about the 16th day of July, 1972, the defendants, Dennis Dainack and Leslie Van Houten, took plaintiff into their custody at Main Street, Livingston Manor, N.Y. and transported plaintiff in a State Police car to a place outside of Livingston Manor, N.Y.

4. That at the said time and place on July 16, 1972, when the defendants took plaintiff into their custody, the said defendants did not have any warrant or order of arrest for or against the plaintiff.

5. That at the time when defendants took plaintiff into their custody, they informed plaintiff that they were State Police Officers, and if they did not make such disclosure, state exactly what each defendant said to the plaintiff when they took plaintiff into their custody.

6. That on or about July 16, 1972, when defendants took plaintiff into their custody, there was no complaint or charge of violation of any provision of the Penal Law of the State of New York or of any violation of any law which would warrant or justify the arrest and seizure of the plaintiff.

7. That defendants were operating a vehicle of the New York State Police at the time when they arrested and seized the plaintiff on or about July 16, 1972.

8. What was the reason and purpose of the defendants for arresting and seizing the plaintiff in or about July 16, 1972?

9. (a) Describe the exact location or the place to which defendants took plaintiff in the State Police car in or about July 16, 1972.

(b) Was there any building or structure at such location?

(c) What was the time of the day when defendants arrested plaintiff?

10. Did defendants or either of them assault and beat the plaintiff at the place to which they took him in the State Police car as aforesaid?

11. What did defendants do to or with plaintiff at the place to which they took him?

12. (a) State whether there were any other persons, police officers, or witnesses at the place to which the defendants had taken the plaintiff as aforesaid?

(b) If so, state the names, occupations, and addresses of each of said persons, police officers or witnesses?

13. How long did defendants hold and retain the plaintiff at the place to which they had taken him as aforesaid?

14. (a) What did defendants do with plaintiff after they left the place to which they had taken him?

NOTICE OF INTERROGATORIES

15. (a) What was the total elapsed time that defendants had plaintiff in custody on or about July 16, 1972 from the time defendants arrested or took him into their custody to the time that they released him?

(b) If the defendants claim that they did not arrest or seize plaintiff on or about July 16, 1972, describe the form of custody which they applied to plaintiff during the time that plaintiff was in their control?

16. (a) Did defendants or either of them take the plaintiff before any Court or justice after they had arrested plaintiff on or about July 16, 1972?

(b) Did defendants or either present a charge, information or criminal complaint against plaintiff before any Court, justice or grand jury against the plaintiff?

17. (a) Did defendants inform plaintiff that he could call his attorney on or about July 16, 1972?

(b) Did plaintiff demand the right to call his attorney?

(c) Did defendants allow plaintiff to call his attorney?

18. (a) State the Court in which defendants claim that there is another action pending between the same parties and the cause of action herein; set forth a copy of the summons and complaint, answer and all other legal process therein; set forth the date and place when process in said action was claimed to be served.

(b) If there is no such action, do defendants now admit that there is no such action?

Dated: Monticello, N.Y.

October 13, 1975

Yours, etc.,

ROSEN & ROSEN,
Attorneys for Plaintiff,

By
GEORGE H. ROSEN

Office & P.O. Address
265 Broadway, P.O. Box 348
Monticello, N.Y. 12701

Tel. 914-794-7733

NOTICE OF INTERROGATORIES

TO:

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the
State of New York
Attorney for Defendants
2 World Trade Center
New York, New York 10047

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

VINCENT J. BELLOWS, : ANSWER TO INTERROGATORIES

Plaintiff, :

-against- : 73 Civ. 1189 (MEF)

DENNIS DAINACK and LESLIE VAN HOUTEN, :

Defendants. :

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Defendants, for their answers to plaintiff's interrogatories, set forth the following:

1. Dennis Dainack was served with 2 copies of the "Notice of Claim" on or about October 7, 1972.

2. Brian Van Houten was served with 2 copies of a "Notice of Claim" on or about October 7, 1972.

3. On or about that July 16, 1972, defendant placed plaintiff in a state police car for booking on public intoxication, to properly identify plaintiff and to further investigate a report of an assault, menacing, or reckless endangerment, by a Homer Salisberry. Plaintiff had failed to respond beyond his name, as to reasonable requests for his address and explanation of his conduct. Such action was in accordance with the law, done in good faith and based on probable cause to believe plaintiff was publically intoxicated and a danger to himself or others.

4. Defendants did not have a warrant, but plaintiff looked and acted intoxicated and defendants had a personal report from a Homer Salisberry that plaintiff had engaged in conduct constituting a Class A misdemeanor, i.e. reckless endangerment.

5. At the time defendants placed plaintiff in the State Police car, they were in uniform, and told plaintiff to get in the car. The purpose was to take plaintiff in for public intoxication and investigate his identity.

6. There was a complaint of Homer Salisberry as to an assault, reckless endangerment. On questioning of Homer Salisberry indicated plaintiff was a participant in this crime against the person of Salisberry. Plaintiff left the scene before he could be questioned, beyond giving of his name. Plaintiff appeared and acted in an intoxicated manner and two companions had stood up, creating a possibly dangerous situation.

7. Defendants were operating a State Police car.

8. See # 3.

9. Defendant Van Houten drove around the corner to a caution light (2 streets up Pearl Street) and turned around. He returned to Main Street and left plaintiff off in front of the (b)Bank.

(c) Defendants placed plaintiff in the car for booking on public intoxication and investigation of prior crime and at or around 12:15 A.M., July 17, 1972.

10. No defendant assaulted or beat plaintiff in the car at this or any other time.

11. Plaintiff was questioned in the car, gave a proper account of his conduct, did not appear to be extremely intoxicated. After this questioning he was released. Plaintiff was not taken to any specific place, and the car never stopped, except momentarily to turn around at the caution light.

ANSWERS TO INTERROGATORIES

12. (a) No other witness

(b)

13. Plaintiff was in the car a total of 5 or 10 minutes, from being taken into custody and released.

14. (a) Plaintiff was released at the Bank on Main Street, a block or two from the place where he entered the car.

15. (a) At most 10 minutes.

(b) See #3.

16. (a) No, as defendants determined in accordance with law not to complete the arrest procedure.

(b) No - see above.

17. (a) No, defendants heard plaintiff tell his friends to call his attorney.

(b) No

(c) Plaintiff never requested such permission. The standard procedure is that arrestee calls attorney at station house. Since the plaintiff was released before the issue never came up.

18. (a) and (b), On October 7, 1972 served a Notice of Claim. It was believed at this time, this was to institute an action in the New York State Court of Claims. Further investigation indicated no action pending therein. Defendants admit there is no such action although plaintiff had two prior actions there.

S/
DENNIS DAINACK

S/
BRIAN VAN HOUTEN

Sworn to before me this
day of November, 1975

-12-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

VINCENT J. BELLOWS, :

Plaintiff, : 73 Civ. 1189

-against- : (MEL)

DENNIS DAINACK and LESLIE VAN HOUTEN, :

Defendants. :

----------X

DEFENDANTS' REQUESTS TO CHARGE (RETYPED)

1. Ladies and gentlement of the Jury, now that you have heard the evidence in this case and the arguments of counsel it is my duty to give you the instructions of the Court as to the law which is applicable to this case.

2. It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in this case.

3. You are not to single out any one instruction alone as stating the law, but you must consider the instructions as a whole as the law applicable to this case.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to

what the law ought to be, it would be a violation of your sworn duty to base a verdict in this case upon any other view of the law than that given by the Court, just as it would be a violation of your sworn duty as jurors in this case as judges of the facts to base a verdict upon anything except the evidence that has been presented in this case.

4. Justice through trial by jury must always depend upon the willingness of each juror to seek the truth as to the facts from the same evidence presented to all of the jurors and to arrive at a verdict by applying the same rule of law as given in the instructions of the Court.

5. Unless otherwise instructed, you should consider each instruction given to apply separately to the plaintiff and to each of the defendants in this case. I would remind you that this case is a suit against several individuals as defendants, and each case should be considered by you separately.

6. You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the Plaintiff, the claims contained in the complaint, and the answers and defenses raised by the Defendants. You are to perform this duty without bias or prejudice as to any party.

7. Our system of law does not permit jurors to be governed by sympathy, prejudice or public opinion. You will

carefully and impartially consider all of the evidence in the case, and apply to that evidence the law as stated by the Court and reach a just verdict regardless of the consequences.

8. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life. The law is no respecter of persons. All persons stand equal before the law and are to be dealt with as equals in a court of justice.

9. Specifically, you are instructed that you are to weigh the credibility of the Plaintiff, just as you would weigh the credibility of any other witness.

10. The burden is on the Plaintiff in a civil action to prove every essential element of his or her claim by what we call a preponderance of the evidence. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the Jury should find for the Defendants.

11. To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds a

belief that what is sought to be proved is more likely true than not true. If in your opinion, however, the evidence on an issue is equally weighted than it is your duty as a jury to find that plaintiff has not sustained his burden.

12. In determining whether any facts in issue have been proved by a preponderance of the evidence in the case the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced those exhibits.

13. There are, generally speaking, two types of evidence from which a jury may properly determine the truth as to the facts in a case.

14. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

15. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the Jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

16. You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds a belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such a belief in your minds.

17. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate.

(No number 18 and 19).

20. Any evidence to which the Court has sustained an objection may not be considered by the Jury in any manner in arriving at a verdict in this case. Anything that you may have heard or seen outside of this courtroom is not evidence and it should be entirely disregarded by you in arriving at a verdict in this case.

21. You are to consider only the evidence in this case as presented from this witness stand, but in your consideration of the evidence you are not limited to the bald statements of the witnesses.

22. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted

to draw from facts which you find have been proved such reasonable inferences as seem justified in the light of your experience. However, it is a rule of law that you may not pile an inference upon an inference. Thus you cannot say that a piece of evidence proves one thing, and from that infers a second thing and from that infers a third thing.

23. If depositions are recieved in evidence during the trial of this case, certain testimony has been read to you by way of deposition, consisting of sworn written answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case.

24. You, are jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, by the manner in which the witness testified, by contradictions in the witness's testimony, by the character of the testimony given.

25. You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand.

26. Consider the witness' ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters.

27. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

28. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood. If you find that a witness has misrepresented a fact, you may either disregard all the testimony of that witness, or merely disregard so much of the testimony as relates to a misrepresented fact.

29. After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

30. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters, in which they profess to be expert, and may also state their reasons for the opinion.

31. You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education, experience, or factual information or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely, or to the extent you find it inconsistent.

32. The Plaintiff in this case claims damages for physical injuries alleged to have been suffered or sustained by him as the result of the deprivation, under color of state law, statute, regulation, custom or usage of rights, privileges and immunities secured to plaintiff by the Constitution of the United States.

33. Section 1983 of Title 42 of the United States Code, which is the applicable statute involved, provides that

any person may seek redress in this Court, by way of money damages, against any person or persons, who, under color of state law, statute, regulation, or custom, subjects or cases the subjection of such inhabitant to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States.

34. The Plaintiff claims, in brief, that Defendants violated his constitutional rights under the Fourteenth Amendments to the United States Constitution.

(No number 35).

36. The Fourteenth Amendment provides, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

37. The plaintiff claims that on or about July 16, 1972 in Livingston Manor, New York, he was arrested by defendants, New York State Police officers without probable cause and taken in a State Police car. While in the car, plaintiff claims defendant Dainack assaulted him. Thereafter plaintiff was released by defendants witnout any charges being placed against him.

38. The defendants contend that they did arrest or take into custody plaintiff. They claim they had good cause to arrest plaintiff and acted in good faith. It is contended that plaintiff had been identified as a participant in an assault and further he acted in an intoxicated manner. After identifying plaintiff, defendants did release plaintiff without placing any charges against him.

39a. The mere fact that the evidence in the case may establish physical contact between the defendants and the plaintiff, which resulted in personal injury to the plaintiff, is not proof that the defendants acted beyond their lawful authority under State law.

The defendants had the lawful authority, indeed the lawful duty under State law, to use such physical force or may have been reasonably necessary to effectuate an arrest.

So, even though you should find from a preponderance of the evidence in the case that the acts alleged by the plaintiff were in fact knowingly done by the defendants, if you also find that they were done for any one or more of the lawful purposes mentioned, such conduct of the defendants were not beyond the bounds of their lawful authority under state law, and so was lawful, unless you further find, from a preponderance of the evidence in the case, that the defendants used more or greater force or means on the plaintiff than would have appeared to a

reasonable person, in like circumstances, to be necessary in order to accomplish the lawful purpose or purposes intended.

If you find, from a preponderance of the evidence in the case, that the defendants did not act within the limits of their lawful authority, but acted beyond the bounds of their lawful authority under state law at the time and place alleged, then you must find that the defendants did, "without due process of law," deprive the plaintiff of liberty secured and protected to him by the Constitution and laws of the United States, since the state law applicable in this case is equivalent to the due process requirements of the Federal Constitution, and ycu will return a verdict for the plaintiff.

If, however, you do not find, from a preponderance of the evidence in the case, that the defendants acted without the bounds of their lawful authority under state law, at the time and place alleged, then the jury should return a verdict in favor of the defendants; for, as previously stated, unless the defendants acted outside the limits of their lawful authority under state law, then the defendants did not deprive the plaintiff of any liberty "without due process of law," and you will return a verdict for the defendant(s).

39b. State law permits a police officer sued as defendants to arrest a person where he has reasonable cause to believe an offense has been committed. He can question a person

about the event. Even without an arrest warrant an officer can arrest a suspect for any offense if an offense is committed in his presence, or has reasonable cause to so believe. It need not be in the officer's presence if the offense constitutes a crime.

Public Drunkenness was an offense at the time herein.

Reckless endangerment was a crime.

(No number 40, 41, 42, 43).

44. In order for Plaintiff to recover money damages from one more of the Defendants, the burden is upon the Plaintiff to establish by a preponderance of the evidence:

First, that one or more of the Defendants had some degree of personal responsibility for those violations of Plaintiff's constitutional rights; and

Second, that those violations directly and proximately caused physical or non-physical injury or damages that Plaintiff alleges he suffered.

(No number 45 and 46).

47. Defendants claim that if they did violate Plaintiff's constitutional rights, they did so unintentionally, and that they acted in good faith and with a reasonable belief that their acts, conduct, omissions or failures to act did not violate Plaintiff's constitutional rights.

48. I will refer to this contention, for simplicity, as the "good faith defense." You are instructed that good faith, as defined in these instructions, is a defense. Accordingly, if you should believe from a preponderance of the evidence that a Defendant reasonably believed, in good faith, that his or her acts, conduct, omissions, or failures to act did not violate what he or she know to be, or what he or she should reasonably have known to be, Plaintiff's clearly established constitutional rights, then you should enter a verdict for that Defendant, even if you find that the Defendant's acts, conduct, omissions, or failures to act did violate Plaintiff's constitutional rights.

49. The burden is upon each Defendant to prove each element of this good faith defense by a preponderance of the evidence.

50. If you find that a Defendant violated Plaintiff's constitutional rights and find further that that Defendant introduced no evidence that he or they acted in good faith, or failed to carry his or their burden of proving that he or they acted in good faith, as defined herein, then you should enter a verdict for the Plaintiff, against that Defendant/s.

51. If you find that a Defendant did not violate Plaintiff's constitutional rights or that, if he or she did, he or she acted in good faith, as defined herein, then you should enter a verdict for that Defendant.

52. If you should find that the Plaintiff is entitled to a verdict you will award her a sum which will compensate her reasonably for the violations of his constitutional rights.

53. If you find that the plaintiff is entitled to a verdict in accordance with these instructions, but do not find that the plaintiff has sustained substantial damages, then you may return a verdict in some nominal sum such as one dollar.

54. (In event plaintiff requests a charge on punitive damages).

With respect to a nominal award -- A nominal sum for actual damages would preclude an award of punitive damages in a larger amount.

55. You are instructed that not every push or shove violates a prisoner's constitutional rights.

You should consider the amount of force alleged, the extent of injury inflicted, whether the force was applied maliciously or sadistically for the very purpose of causing harm.

56. Laverne v. Corning, 522 F 2d 1144 (2d Cir. 1975). Even if the arrest or taking into custody was unconstitutional or unlawful, defendants' good faith is a defense to this action.

The defendants need not predict the future course of constitutional law or later changes in law.

At the time of the arrest the defendant could lawfully arrest the plaintiff for public drunkenness or to investigate.

The defendants' good faith in acting as they did has both a subjective and objective element.

(a) The defendants must have believed the arrest or taking into custody was lawful.

(b) This belief must have been a reasonable one in light of the circumstances.

57. A police officer may arrest person for any offense when he has reasonable cause to believe that such person has committed such offense in his presence. (CPL 140.10).

58. A police officer may arrest a person for any crime including a misdemeanor, whether committed in his presence or not, where he has reasonable cause. (CPL 140.10).

59. Public intoxication is when a person appears in public place under influence of alcohol to the degree that he may endanger himself or other persons, or annoy persons in his vicinity. This is a violation. (Penal Law 240.40 - until 1/1/76).

60. Even after an arrest, a police officer may further investigate and if he determines there is not reasonable cause, he need not take the prisoner to the station house and then court, but must immediately release the person from custody. (CPL 140.20 [4]).

Thus, if defendants had reasonable cause to arrest plaintiff and then determined otherwise, the law requires that plaintiff be released, rather than be taken to the station house and court.

Dated: New York, New York
January 11, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By:

S/

A. SETH GREENWALD
Assistant Attorney General
Office & P.O. Address
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New York, New York 10047
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BELLOWS v. DAINACK and VAN HOUTEN

QUESTIONS TO THE JURY

1. As to Bellows' claim that he was improperly taken into custody, do you find from a preponderance of the evidence that the defendants had reasonable cause to believe that Vincent Bellows was publicly intoxicated in their presence on the evening of July 16, 1972 and that they acted in good faith in taking him into custody?

Yes _____

No. X

2. Do you find that the defendants or either of them applied physical force to Vincent Bellows by twisting his arm to force him into the police car on the night of July 16, 1972:

A. As to Dennis Dainack?

Yes X

No _____

B. As to ~~Leslie~~ Van Houten?

Yes _____

No. X

3. Do you find that defendant Dennis Dainack applied force to Vincent Bellows within the police car on the night of July 16, 1972?

Yes X

No _____

QUESTIONS TO THE JURY

If the anwer to all of the questions above is no, go no further.

If the answer to any of the questions above is yes, proceed to answer the next questions.

4. How much actual physical and emotional damage do you find that Vincent Bellows suffered as a result of the ~~evidence~~ of July 16, 1972?

A. With regard to being taken into custody?

$ 400

B. With regard to physical force getting into the car?

$ 4000

C. With regard to physical force inside the car?

$ 4000

5. Should punitive damages be awarded against the defendants or either of them in accordance with the instructions given you by the court?

Yes X

No _____

If the answer is no, go no further.

If the answer is yes, answer the next questions.

6. The amount of punitive damages awarded are as follows:

A. As to Dennis Dainack - $ 2000

B. As to ~~Leslie~~ Van Houten - $ 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

NOTICE OF MOTION

73 Civ. 1189 (MEL)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of A. SETH GREENWALD, sworn to the 2nd day of April, 1976, the affidavits of Dennis Dainack and Brian Van Houten, sworn to the 2nd day of April, 1976 and the letter of George Rosen, dated March 26, 1976, and all the prior proceedings, the undersigned will move this Court at 10:00 a.m., April 15, 1976, or as soon thereafter as counsel can be heard in Room 1903, United States Courthouse, Foley Square, New York, New York for an order pursuant to Rule 59 of the Federal Rules of Civil Procedure to set aside the verdict of the jury, upon the grounds of perjury, or to grant a new trial upon the grounds that the charge of the Court presented the case in a manner which was beyond the jurisdiction of the Court, or in the alternative setting aside or reducing the verdict of jury as excessive including the elimination of punitive damages, and for such other and further relief as may be just and proper including a stay of judgment.

Dated: New York, New York
April 2, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

A. Seth Greenwald

A. SETH GREENWALD
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3396

TO: GEORGE ROSEN, ESQ.
265 Broadway
P.O. Box 348
Monticello, New York 12701

MOTION TO SET ASIDE VERDICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

AFFIDAVIT IN SUPPORT

73 Civ. 1189 (MEL)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for defendants herein. This affidavit is made in support of defendants' (1) motion for judgment n.o.v. and a new trial, which was denied by the Court but without prejudice to renewal upon papers, and (2) the motion to set aside or reduce the verdict on the grounds of excessiveness.

The instant action was brought by plaintiff for alleged deprivation of his federal constitutional rights by virtue of a brief taking into custody on the night of July 16-17, 1972 by defendants, two New York State Police Troopers. Also claimed was use of force in the arrest and a another use of force (one blow) upon plaintiff while detained in the police car. There was no claim of physical injury.

The action came on for trial before the federal court and a jury on March 22-23, 1976. The jury returned a verdict against defendants of a total of $12,000 compensatory damages and $5,000 punitive damages divided as $3,000 against defendant Dainack and $2,000 against defendant Van Houten.

MOTION TO SET ASIDE VERDICT

I. Reasons for Granting a New Trial

A. Deficiencies of the Charge

While this case was on a complaint* of a violation of federally protected constitutional rights, it is apparent from the charge of the court and the special verdict presented that the jury was asked to determine issues of fact which were not within the jurisdiction of the federal district court and therefore, the jury.

It is abundamently clear that the jury was instructed to decide a case of false arrest and assault. Regardless of the lack of exception or objection by the defendants, this is a jurisdictional defect as to subject matter and cannot be waived. United States v. DeCamp, 478 F. 2d 1188 (9th Cir., 1973), cert. den. 414 U.S. 924. The parties cannot confer jurisdiction on the district court where none exists. Lee v. United States, 501 F. 2d 494 (8th Cir. 1974).

The court charged (hs9)** that if the jury concluded the defendants acted "contrary to the law of the State of New York. . ." a verdict should be returned in favor of plaintiff on this claim (false arrest). By allowing the jury to find liability on violation of state law, the federal court was acting outside its jurisdiction. The charge was for false arrest, a state tort and not for a violation of civil rights.

As to physical force (twisting the arm and "striking" plaintiff in the police car) the court charged (hs11) that the question was simply whether defendants applied force. If

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* The complaint consisted of one cause of action although the court submitted it to the jury as if there were three causes of action.

** Numbers in parentheses refer to Reporter's motion on transcript.

they (defendants) did the jury was to find for plaintiffs. This is simply an instruction on assault, a state tort, and once again not for a violation of civil rights.

The "Questions to the Jury" presented by the Court as a special verdict, simply reiterated the charge as to finding that defendants had committed a false arrest and assault. There was no question as to whether the defendants had violated plaintiff's civil rights by virtue of the alleged acts. Thus the court presented a case to the jury which was outside its subject matter jurisdiction.

On the very day the case was going to the jury, the Supreme Court in Paul v. Davis, ____ U.S. _____ (44 L.W. 4337), held, once again, that violation of local law does not necessarily mean that federal rights have been invaded. Citing at 4339, Screws v. United States, 325 U.S. 91 (1945) the quote pointed out that even if a prisoner is "assaulted, injured, or even murdered by a state official", this does not of necessity mean that a plaintiff has been deprived of any right secured by the federal constitution. Thus a libel does not state a violation of civil rights. See also Street v. Surdyka, 492 F. 2d 368, 372-373 (4th Cir. 1974). It is jurisdictionally necessary to charge the jury on the necessary elements of a violation of civil rights.

The charge and questions were so inadequate to instruct the jury on the law of violation of civil rights, and allowed, - neigh - instructed the jury to find liability on the basis the state common law of torts (false arrest and assault) that the federal court lacked jurisdiction to present such a case to the jury. Even Johnson v. Glick, 481 F. 2d 1028 (2d Cir. 1973), cert. den. 414 U.S. 1033 at 1033, makes clear that not every push or shove (obviously an application of force) violates a person's

constitutional rights. While defendants requested this instruction it was not given. Thus the charge of the court failed consider the factors enumerated in Johnson, or instruct the jury as to them.

The complete inadequacy of the charge as to the law on a violation of civil rights, leaving the jury free to find liability on simple state torts, deprived defendants of a fair trial and warrants setting aside the verdict. As said in Callen v. Pennsylvania R. Co., 162 F. 2d 832, 835 (3d Cir. 1947), affd. on other gds. 332 U.S. 625 (1948), "the failure [by appellant] to suggest such point does not excuse the omission from the charge of the laws of that phase of the case which should have been charged of the Court's own motion". Regardless of objection, a court's error in instructing on a material issue should be the basis for a new trial when it is apparent, as here, a miscarriage of justice may otherwise occur. 6A Moore's, Federal Practice, ¶59.08[2] (59-106, 107). It should be obvious that the grossly excessive size of the verdict, totally unsupported by any fact of damages, demonstrates that a miscarriage has occurred.

The charge also was erroneous in placing the burden of proof on the defendants as to the arrest. The questions to the Jury #1 showed that plaintiff had no burden, contrary to law. Defendant had the burden of the "good faith" defense and to prove plaintiff public intoxicated. This also was shown (hs9) in the charge. It should be noted (hs23), the Court did not allow defendants' counsel to state his objections.

Furthermore the charge denied defendants a good faith defense on the arrest by splitting the arrest from the performance of same (by alleged force). Defendants then were denied "good faith" on the grounds they denied using force (hs12). This was objected to (hs13). Defendants are entitled to every defense and it was possible for the Court to so charge although defendants denied the use of force.

Finally, while charging punitive damages (dhs), the Court refused to charge nominal damages (hs7), which was an entirely reasonable request by defendants, in light of the de minimis nature of the incident in question. The prejudice was obvious. The jury failed to be appraised of its right to find for plaintiff but fairly consider his actual damages.

In sum the defendants were deprived of a fair trial and should be granted a new one.

B. The erroneous admission of highly prejudicial testimony as to prior arrests by the State Police and acquittals

The instant case is rather peculiar in that plaintiff asked to be allowed to testify on his prior arrests and defendants objected. Initially the Court concurred that the testimony was inadmissible as the defendants were in no wise connected to these prior incidents. However, in rebuttal, the Court allowed such testimony on the issue of whether plaintiff would have broken down and cried in the police car. Supposedly the numerous arrests and acquittals was relevant to the issue. The defendants strenously objected because it was apparent that, despite the Court's limiting instruction (given only at the time of admission not in the charge) the defendants, as State Police troopers, would be seen as part of some vast police conspiracy to deprive plaintiff of his constitutional rights. The prejudice was compounded by plaintiff's counsel's prejudicial summation* asking the jury to put a stop to the conduct, implying a course of conduct, using a false expression "lie like a trooper" -- it really is "swear like trooper" -- and generally asking the jury to compensate the plaintiff for his prior incidents of which

* The trial minutes have been ordered and should be available within several weeks.

defendants had nothing to do. The verdict returned can only be explained as a result of the erroneous introduction of the evidence of prior incidents. No amount of instruction by the Court could erase the severe prejudice to defendants. Simple justice requires a new trial here on this point alone.

It should be noted that the new Federal Rules of Evidence basically allows all relevant evidence. Rule 402. Even if the prior arrests had some relevance to crying, a dubious proposition, it should have been excluded because its probative value was substantially out-weighed by the danger of unfair prejudice, confusion of the issue and misleading the jury. Rule 403. While there were limiting instructions (Rule 105), it was an abuse of discretion and an error of law to admit the testimony. See as to exclusion of similar but unconnected incidents, Olin-Matheison Chem. Corp. v. Allis-Chalmers Mfg. Co., 438 F. 2d 833, 838-839 (6th Cir. 1971).

When the verdict has so little relevance to the facts of the case, the verdict was emotional and the failure to exclude prejudicial testimony is error. The Court failed to balance "the probative value of and the need* for the evidence against the harm likely to result from its admission". Advisory Committee's Note on Rule 403.

II. Perjury by the Plaintiff

On direct examination of plaintiff at the trial, March 22, 1976 he was asked by his own counsel:

> "Q. Did you try to get William Welch?**
>
> A. Yes, I did.

---

* What need had the plaintiff to prove he does not cry? It had no bearing on his testimony. The defendants testified to the crying as a factor in deciding to release plaintiff. This was not harmful to plaintiff.

** William Welch was one of two friends with plaintiff when he was arrested by defendants.

Q. Were you able to locate him?

A. No, I wasn't.

Q. Did I request you to locate him?

A. Yes".

(annexed as exhibit)

Immediately after the trial the defendants, by chance, learned from William Welch, whose previous whereabouts were not known, to defendants that plaintiff had spoken to him about testifying at the trial on two ocassions, immediately before trial. This must have been the weekend before as plaintiff had only come up from Florida for the trial. The affidavits of defendants (annexed) recite the background. And we hope to have William Welch here in court to testify as to this. We are subpoenaing him. To this end we ask the Court to hold an evidentiary hearing. This is also cause that plaintiff's lawyer should be put on voir dire. His letter of March 26, 1976 to the Court appears a carefully contrived attempt to cover up an obvious perjury which he may have been very well aware of at the time he asked plaintiff the question as to locating Welch.*

Obviously if Mr. Welch met plaintiff right before trial (and we believe there are witnesses as these meetings probably took place in a bar, plaintiff comitted perjury when he said he could not locate Mr. Welch).** While we are aware that new trial for under Rule 59(b) for newly discovered evidence are not granted as a normal rule for evidence that goes to credibility, if plaintiff committed perjury, this is highly material. Credibility was central to the case. The plaintiff

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* The letter of March 26, rather than showing harassment by defendant, shows that Mr. Rosen may be obstructing justice by seeking or encouraging Mr. Welch not to testify as to these meetings with plaintiff.

** We have reason to believe Mr. Welch would not corroborate plaintiff's story.

testified as he did for a purpose. It was to avoid the defendants from asking for an instruction on a missing witness. See Devitt and Blackmar, Federal Jury Practice and Instructions, § 71.18. Furthermore the court failed to charge at all on disregarding the t[illegible] of a witness and especially a party who did not tell the truth; De[illegible]tt and Blackmar, §§ 72.03, 72.04. It was "material" to plaintiff to establish the absence of William Welch.* If plaintiff perjured himself, it is entirely likely the jury would have reached a different conclusion, especially as to the punch in the car who there was no other evidence than plaintiff's testimony and the circumstances of which were entirely improbable.

The facts were in existence at the time of trial. There was no reasonable way defendants could have known of the meeting as over the weekend they were preparing for trial with their counsel. We submit upon the hearing of the testimony of William Welch, we will satisfy the conditions for the granting of a new trial on newly discovered evidence. See Marshall's U.S. Auto Supply v. Cashman, 111 F. 2d 140, 142 (10th Cir. 1940). See 6A Moore's, ¶59.08[4], 59-123.

The plaintiff's counsel claims harassment, but his obvious efforts to dissuade William Welch from coming to court should show where the truth is. Defendants have not harassed plaintiff. They have a right to talk to witnesses. Simply because they are State police does not mean they have lesser rights than the average citizen.

III. Excessiveness of the Verdict

Besides the errors alluded to above which warrant the setting aside of the verdict, the award by the jury of compensatory damages in the amount of $12,000 against the defendants

* While plaintiff's counsel did not ask for any instructions to the jury, he made something in summations of the failure of defendants to bring Homer Salsberry to court as a witness.

and punitive damages in the amount of $3,000 against defendant Dainack and $2,000 against the defendant Van Houten was grossly excessive as a matter of law. The verdict, in light of the evidence, is so excessive and unreasonable that it wuuld be unconscionable to permit it to stand.

It should be emphasized that there was absolutely no medical evidence of any physical injury. While the plaintiff says he went to a doctor, the doctor did not testify for him and no medical bills were introduced. Indeed the plaintiff's counsel minimized this aspect by stating the bill was for $5. Thus while the plaintiff was upheld by the jury on the use of force in arresting him and one blow in the car, obviously the force was not of an aggravated nature and was of such slight impact as not to cause any physical injury. Thus there were no physical damages.

As to "emotional" injury, we are faced with the de minimis detention of 5-10 minutes in a police car. In that time plaintiff was simply sitting in the back seat unrestrained. After this time he was released without even having to face any further charges. This leaves one with the question whether 5-10 minutes in the back seat of a police car warrants an award of $12,000 in compensatory damages - plus $5,000 in punitive damages.*

While damages are in the province of the jury, the excessiveness can be demonstrated by comparing the award in the instant case with similar cases. In all the cases we have examined there were aggravating circumstances which are totally absent in the instant case and yet, in all (with one exception) the awards were lower, and substantially so upon examination.

* Of course $8,000 were awarded for force during the course of the arrest and the one blow, but without any physical injury, it is impossible to see how this can stand.

MOTION TO SET ASIDE VERDICT

Recently in Manfredonia v. Barry, 401 F. Supp. 762 (E.D.N.Y. 1975), Judge Neaher awarded $3,500 to each plaintiff where the plaintiffs suffered mental and emotional distress and were subjected to public notoriety and embarassment as a result of police action. There were the consequences of finger-printing, photographing, an uncomfortable overnight stay in jail, continued court proceeding when the police refused to dismiss the charges, arrest records stigmatizing both plaintiffs with an odious offense even though the charge was later dismissed, and extensive newspaper and media notoriety. 410 F. Supp. at 771. Yet for all this a compensatory award of $3,500 was given. (An award of $500 punitive damages was allowed, id. 773). Of course absolutely none of the above is present in the instant action.

At n. 9, Manfredonia, at 771 lists numerous civil rights actions with damages. See also 770). While familiar elements of damage (loss of earnings, out-of pocket loss, physical injury) are not essential to award of damages here, reasonable compensation is not unlimited. Obviously the familiar elements support a larger award; but their absence, as here, warrants a severe reduction of the jury verdict herein.

(1) The only case even approaching the verdict here is Gaston v. Gibson, 328 F. Supp. 3 (E.D. Tenn. 1969). There the award was $10,000 compensatory damages and $30,000 punitive. The conduct of the police was characterized as "shocking". Plaintiff had medical bills of $736.60 and suffered from a lasting head injury due to brutal police abuse. A mere reading of the opinion shows that the award was based on conduct infinitely more "shocking" than any herein.

(2) By way of comparison, recently in this District, in the case of Vargas v. Correa, 74 Civ. 1257 (S.D.N.Y., 3-8-75), an award of $250 compensatory and $300 punitive was allowed. Therein a prison guard provoked plaintiff. The

guard, the defendant, punched plaintiff in such a severe manner so as to throw him against the bars of the prison and onto the floor. After plaintiff stood up, there was another attack on him. Plaintiff testified his neck and hand were stiff. However there was no medical evidence. Obviously if two vicious blows entitle one to $250 damages, obviously an award of $12,000 is grossly excessive. Even the punitive damages were a small fraction of $5,000. Basic to the award of $300 punitive damages was a finding of malicious and sadistic application of force for the very purpose of causing harm. (Opn. p. 7). Yet in the instant case the "force" caused no harm and there was no evidence of malice or sadism.

In other cases:

(3) Magnett v. Pelletier, 360 F. Supp. 902 (D. Mass. 1973); $500 damages for police unlawful entry in apartment.

(4) Farber v. Rizzo, 363 F. Supp. 386 (E.D. Pa. 1973); $750 and $500 compensatory damages for unlawful arrest and detention for 2 to 9 hours.

(5) Tatum v. Morton, 386 F. Supp. 1308 (D.D.C. 1974); $100 damages for unlawful arrest and 3 to 4 hours jail detention.

(6) In the state courts, similar actions fail to sustain excessive jury awards. Where the plaintiff has sustained only "mental distress" and "humiliation", with one hour and fifteen minutes detention, the State Supreme Court in Davis v. Town of Eastchester, (Westchester Co.), New York Law Journal, December 30, 1975, p. 12, c. 4, reduced a jury verdict from $5,000 to $2,000. Noted was that "(t)he jury verdict and the summation of the attorney indicate that the verdict was punitive as opposed to compensatory".

It should be abundantly clear that without any physical injury and basic absence of emotional injury* plaintiff herein was entitled at best to nominal damages. Failure to charge on nominal damages, as requested, was error. At worst, compensatory damages of a few hundred dollars would be adequate to compensate him for the entire incident. Plaintiff was gone for 10 minutes at most and never was subjected to any legal proceeding. Any "force" must have been de minimis as it caused no physical injury.

Therefore the total award of compensatory damages in the amount of $12,000 was the result of prejudice and passion against the defendants. The compensatory award was totally punitive in basis and effect. The introduction of testimony by plaintiff on his prior arrests by the State Police and acquittals - and quite improperly - obviously inflamed the jury, severely prejudiced the defendants who were in no way involved. Why they should compensate plaintiff for an alleged 10 years of State Police "harassment" is beyond the scope of the action.

The award of a total of $5,000 punitive damages simply added insult to injury. The facts of the case simply do not warrant any award of punitive damages. If the circumstances of this action were not motivated by malice, and no elements of wantonness, or overbearing as any application of force was momentary and of insufficient quality to inflict even the slightest sign of physical injury, and obviously no psychological injury, the punitive damages were not set with a calm mind and sound discretion. As the compensatory damages had no rational relation to any conceivable damages, but rather were punitive, the punitive damages were set in a manner which cannot be upheld as a matter of law. Once against the jury was acting as a result

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* Plaintiff and his attorney made a great effort to "show" that plaintiff does not cry. I.e., police detention does not cause him any distress.

of the introduction of prejudicial testimony (of prior arrests) of no probative force. It acted to punish the State Police in general through the defendants, who were innocent. In the interests of justice, no punitive damages should be allowed here because while the defendants may have made a mistake, they never were shown in any testimony to be malicious, wanton or over caring. Rather compassion was shown to plaintiff by voluntarily re[illegible]ing him after 5-10 minutes in the car. For this act of kindness to be rewarded by punitive damages of $5,000 is a miscarriage of justice.

In sum the total award of $17,000 to plaintiff was shockingly high. It was so high as to warrant setting aside the verdict and granting a new trial. Even reducing the verdict as excessive cannot compensate for the totally arbitrary, unreasonable and irrational manner the jury had to have arrived at its verdict. Indeed the size of the verdict must demonstrate that the jury ignored the evidence and acted in response to improper summation of plaintiff's counsel based on highly prejudicial evidence of no probative value.

Viewed properly the instant action should have been in a Small Claims Court. The damages, viewed in any light, did not approach, even fractionally, the verdict.

IV. Stay pending appeal

If the Court declines to set aside the verdict or order a new trial, the defendants would request a stay of the judgment pending appeal. F.R.C.P. 62(d). There are quite serious issues of civil rights law, federal jurisdiction and evidence presented by this action.

MOTION TO SET ASIDE VERDICT

WHEREFORE, your deponent respectfully requests that the motion for a new trial or reduction of the verdict be granted, and further that a stay be allowed pending appeal in the event a new trial is not allowed.

A. Seth Greenwald

A. SETH GREENWALD

Sworn to before me this
2nd day of April, 1976

S/Robert S. Hammer

Assistant Attorney General
of the State of New York

MOTION TO SET ASIDE VERDICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

AFFIDAVIT

73 Civ. 1189
(M.E.L.)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BRIAN VAN HOUTEN, being duly sworn, deposes and says:

I am a Trooper in the New York State Police Department and a defendant in the above action. I make this affidavit in support of my motion to hold an Evidentiary Hearing on the issue perjury by the plaintiff at the trial heretofore held on March 22, 1976. At the trial, as the minutes annexed show, the plaintiff testified on direct examination by the attorney George Rosen that he was not able to locate a William Welch who he was allegedly seeking as a witness for plaintiff at the trial. He unequivocally answered the question "Were you able to locate him?" and he answered "No, I wasn't."

On Thursday, March 25, two days after trial while on patrol, I happened to stop in at the Times Inn, a bar located on Pleasant Street in Livingston Manor, New York, about 9:30 or 10:00 in the morning. I saw at the bar a person who was told by his brother Richard Welch to be his brother "Bunky" who at the time I did not recognize but learned was William Welch.

I recognized then that this was the same person who was present at the arrest of plaintiff on July 16, 1972, although I did not as noted, recognize him initially. I approached Mr. Welch and asked him to come outside. He came voluntarily. I told him of the trial and the fact that the jury verdict had been for plaintiff. Mr. Welch told me of his own free will that plaintiff had seen him, Mr. Welch, two days in a row before the trial in Livingston Manor. Further I was told by Mr. Welch that he had informed plaintiff that he did not want to go to testify at the trial. While I was not told the precise day and location of these meetings, there is reason to believe that, of necessity, these meetings took place on the weekend before trial. I have been informed by plaintiff's attorney at the beginning of trial and informed my attorney that Mr. Bellows, the plaintiff, had only come up to Livingston Manor the weekend before trial.

The next day, March 26, I again returned to the Times Inn accompanied by my co-defendant, Dennis Dainack, and once again saw William Welch. We asked him to accompany us to the State Police Barracks at Ferndale to make an affidavit concerning these meetings with plaintiff. Mr. Welch indicated that he had no objection but that he had to go to Albany that day but said that if he got back early enough from Albany he would stop by the Barracks for this purpose. At no time did I in any way coerce Mr. Welch to come to the Barracks. The reason we had to go to the Barracks was that ~~only~~ there was a Stenographer to type up the statement and a Notary Public to take the affidavit. Mr. Welch never appeared at the Barracks and I then received a copy of a letter from Plaintiff's attorney, Mr. George Rosen, which to me indicates that Mr. Rosen sought to prevent William Welch from making an affidavit in this case.

MOTION TO SET ASIDE VERDICT

I have been informed by my attorney that he is seeking a hearing on the above before the Court on April 15, 1976, and a subpoena has been issued and should be served on William Welch to secure his attendance at such a hearing or at any adjourned day at the discretion of the Court.

WHEREFORE, your deponent respectfully requests that the Court hold an Evidentiary Hearing on the meeting between William Welch and plaintiff, which we have been told took place shortly before trial.

S/ Brian Van Houten
BRIAN VAN HOUTEN

Sworn to before me this
2nd day of April, 1976

S/ A. Peter Grossweb
Assistant Attorney General
of the State of New York

MOTION TO SET ASIDE VERDICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

AFFIDAVIT

73 Civ. 1189
(M.E.L.)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DENNIS DAINACK, being duly sworn, deposes and says:

I am a Trooper in the New York State Police Department and a defendant in the above action.. I make this affidavit in support of my motion to hold an Evidentiary Hearing on the issue perjury by the plaintiff at the trial heretofore held on March 22, 1976. At the trial, as the minutes annexed show, the plaintiff testified on direct examination by the attorney George Rosen that he was not able to locate a William Welch who he was allegedly seeking as a witness for plaintiff at the trial. He unequivocally answered the question "Were you able to locate him?" and he answered "No, I wasn't."

On Friday, March 26, 1976 at 9:30 a.m. in the morning I accompanied my co-defendant Brian Van Houten to the Times Inn on Pleasant Street in Livingston Manor. I saw William Welch outside the Times Inn. As is cited in the accompanying affidavit of Brian Van Houten, William Welch told me as well as Mr. Van Houten, that he, William Welch, had seen and talked to plaintiff, Vincent J. Bellows, on two occasions two days in a row, right before the trial.

I, too, would ask this Court to hold an Evidentiary Hearing on these meetings as indicated in the accompanying affidavit of Brian Van Houten. At no time did I in any way coerce the plaintiff, William Welch, to make a statement or affidavit as to these meetings and at all times Mr. Welch appeared to be more than willing to make such an affidavit as to the meetings.

WHEREFORE, your deponent respectfully requests that the Court hold an Evidentiary Hearing on the meeting between William Welch and plaintiff, which we have been told took place shortly before trial.

S/ Dennis Dainack
DENNIS DAINACK

Sworn to before me this
2nd day of April, 1976

R. Seth Greenwald
Assistant Attorney General
of the State of New York

EXHIBIT "A"

EXHIBIT "B" -Charge
(portion of trial
transcript)

EXHIBIT "C"
(portion of trial
transcript)

EXHIBIT "D"
(follows)

ROSEN & ROSEN
COUNSELLORS AT LAW
265 BROADWAY, BOX 348
MONTICELLO, N. Y. 12701

GEORGE H. ROSEN
ROSE S. ROSEN
ROBERT M. ROSEN
WILLIAM C. ROSEN

TELEPHONE
(AREA CODE 914)
794-7733

March 26, 1976

Hon. Morris E. Lasker,
United States District Judge,
United States Court House,
Foley Square,
New York, N.Y. 10007

Re: Vincent Bellows v.
Dennis Dainack and
Brian Van Houten
73 Civ. 1189

Dear Sir:

The above case was tried before you on March 22 and 23, 1976 and resulted in a verdict for the plaintiff.

The defendants Brian Van Houten and Dennis Dainack have gone to Livingston Manor, N.Y., on Thursday and Friday, March 25, and 26, 1976, to obtain an affidavit from William Welch who had been a witness but who was not at the trial before you. Mr. Welch informed me that Trooper Van Houten repeatedly asked him to sign an affidavit to the effect that Mr. Bellows did not ask him to go to the Federal Court. I had spoken to Mr. Welch on the telephone before the trial date was set and he said he would attend. He was not available when Mr. Bellows went to get him.

Mr. Welch refused to sign such an affidavit despite the repeated requests by Trooper Van Houten who was in uniform and using a State Police car. This Trooper wanted Mr. Welch to go to the State Police Barracks at Ferndale to sign such an affidavit.

COPY

The above was reported to me this morning at 11:50 A.M.

This sort of harassment continues what has already resulted in the present action, and in my opinion, constitutes an obstruction of justice by the use of purported police power. These facts are important and further corroborate what occurred at the trial. Such an affidavit could not be signed by Mr. Welch and the police efforts to obtain it are unjustified and possibly unlawful.

My client would appreciate any official action you may take to eliminate this form of police action.

A copy of this letter is being sent to A. Seth Greenwald, Assistant Attorney General, who represented the defendants, to the State Police at Ferndale Barracks and to the two defendants.

Very respectfully yours,

George H. Rosen

George H. Rosen

GHR:fmk

DUPLICATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

- X

OPPOSING AFFIDAVIT

73 Civ. 1189
(MEL)

STATE OF NEW YORK)
COUNTY OF SULLIVAN) SS.:

GEORGE H. ROSEN, being duly sworn, deposes and says that I am an attorney duly licensed to practice in this Court, and I am a member of the firm of Rosen & Rosen, attorneys for the plaintiff herein.

I make this affidavit in opposition to the motion of the defendants returnable on April 15, 1976, pursuant to Rule 59 of the Federal Rules of Civil Procedure to set aside the verdict upon the grounds of (1) perjury, or (2) to grant a new trial upon the grounds that the charge of the Court presented the case in a manner which was beyond the jurisdiction of the Court, or in the alternative, setting aside or reducing the verdict of the jury as excessive including the elimination of punitive damages, and for such other and further relief as may be just and proper in the premises, including a stay of judgment.

PLAINTIFF'S AFFIDAVIT IN
OPPOSITION

The moving papers consist of the affidavit of A. Seth Greenwald, attorney for the defendants, and the affidavits of defendants, Dainack and Van Houten, the charge of the Court and some references to the testimony of Vincent Bellows, plaintiff, and a copy of my letter to Hon. Morris E. Lasker, Judge, dated March 26, 1976.

The motion papers are defective and do not comply with Rule 9(b) of the United States District Court Rules for the Southern District of New York. The Rule 9(b) requires that "a memorandum setting forth the points and authorities relied upon in support of the motion" be served with the motion papers.

The opposing party is required to serve and file with the papers in opposition to the motion an answering memorandum divided in the same way the moving parties' memorandum is divided.

On behalf of the plaintiff, objection is made to the moving papers for failure to comply with Rule 9(b) of the Southern District Rules.

The problem is in answering the moving affidavit which includes citations of authority which are required to be set forth in a memorandum. I shall set forth our position in a memorandum to be served herewith, and if there is any

variance in the divisions, it will be attributable to defendants' non-compliance with Rule 9(b).

This affidavit will be confined to the factual allegations.

IN REPLY TO SECTION 1A OF THE MOVING AFFIDAVIT OF A. SETH GREENWALD.

The alleged Deficiencies of the Charge is a statement of the defendants' contentions and theories and has no place in the affidavit. The statements cover 4 1/2 pages of the said affidavit. The conclusory statement on Page 5 that the defendants were deprived of a fair trial by the erroneous and insufficient charge is without merit.

IN REPLY TO 1B - ADMISSION OF ALLEGED PREJUDICIAL TESTIMONY OF PRIOR ARRESTS OF PLAINTIFF.

Item 1B refers to the error of the Court's ruling permitting prejudicial testimony of prior arrests of plaintiff by the State Police and his acquittals. This section is set forth on Pages 5-6 of the said affidavit of A. Seth Greenwald.

The testimony was allowed by the Court for the limited purpose to show that plaintiff's prior experiences with the State Police might indicate that plaintiff would

not cry or ask for special consideration and that the jury could consider such evidence for such limited purpose. The Court left it to the jury to decide whether the testimony of defendants was truthful in the light of plaintiff's prior experiences.

The attorney for the defendants and the defendants created the situation by introducing the claim that plaintiff cried and asked for a "break" and that defendants generously let him go. See Page 13 of the Greenwald affidavit where the following allegation is aside:

> "Rather compassion was shown to plaintiff by voluntarily releasing him after 5-10 minutes in the car. For this act of kindness to be rewarded by punitive damages of $5,000 is a miscarriage of justice."

The plaintiff had made a complaint to the State Police after he was released. An investigation was made by the State Police of this matter and affidavits were executed by defendants. Nowhere in the affidavits did either of the defendants state that the plaintiff had cried and each defendant testified that their first mention of this crying occurred at the trial. Van Houten testified on March 23, 1976 and said the first time he told about the alleged crying by plaintiff was at the trial. Defendant, Dainack, was recalled by plaintiff and asked when he had

first mentioned it and he testified it was when he testified which was on Monday, March 22, 1976.

The sudden injection of this contention was so spurious that the jury rejected it. The existence of a justifiable and reasonable basis for the arrest was not eliminated by any crying or plea for a "break". If that were a valid reason, a person could commit robbery or murder, and get free by merely crying.

The defendants took plaintiff from his home and away from his friends. Plaintiff was held in the State Police car which had doors opening from the outside and no door handles on the inside as I recall Mr. Bellow's testimony.

The isolation of the plaintiff in the sole custody of defendants placed the full responsibility on the defendants and their denials must be weighed against plaintiff's version of what occurred. That was for the jury to decide and having done so the defendants are not entitled to get a new trial and hope for a better result.

The rulings of the Court were eminently correct because of the contradiction between what plaintiff claimed and what defendants claimed. The evidence was required upon the issue as to who was telling the truth and should have been introduced.

The prior experiences and the background of the plaintiff made it incredible that plaintiff would cry. The defendants testified that when they first met plaintiff that night he gave them his name and refused to make any further statements. A short time later when defendants arrested plaintiff he purportedly became repentant and cooperative.

Yet immediately on his release plaintiff testified he called his lawyer and went to the State Police Barracks and made his complaint against defendants. The various steps corroborated plaintiff and the jury was properly informed of the prior history of plaintiff's experiences with the State Police.

The injection by defendants on their examination in chief about plaintiff's purported crying and asking for a "break" created the issue and they cannot now request a new trial on the ground that the evidence which they introduced did not open the door.

The Court had indicated in Chambers that the evidence would not be allowed in plaintiff's case in chief. The defendants "opened the door" to the rebuttal.

The claim of error is without merit.

IN REPLY TO THE ALLEGATIONS UNDER PART II, PERJURY OF THE PLAINTIFF, ALLEGED BY A. SETH GREENWALD.

The defendants seek a new trial on the ground that plaintiff, Vincent J. Bellows, committed perjury in alleging that he tried to get William Welch to come as a witness but couldn't locate him. That testimony is now claimed by defendants to be perjurious and requires a new trial.

In addition, the accusation is made that I am obstructing justice because William Welch did not give an affidavit to the defendants. That is a specious and unethical contention and utterly false.

I spoke to William Welch on the telephone on March 8, 1976, and he told me he would appear and testify for the plaintiff. I wanted him as a witness.

The plaintiff and David Miller arrived in Court late on Monday, March 22, 1976, and the trial was delayed until they came. William Welch was not with them and I asked where he was. Mr. Bellows could not locate him. An arrangement had been made to pick up Welch and bring him to Court, as I am informed.

The testimony of Mr. Bellows was truthful and correct because Mr. Welch was not at the meeting place.

The point, however, is that Mr. Welch had told me he would testify for the plaintiff and I relied on that telephone conversation. I do not know him personally.

The moving affidavits of A. Seth Greenwald and the two defendants do not state that Mr. Welch was not going to be a witness for the plaintiff or even what he would state.

Mr. Welch spoke to me on March 26, 1976, and told me that he did not wish to sign any affidavit for the State Police, and I told him he didn't have to do so. In my opinion the forced execution of a false affidavit sought to be obtained by the State Police would have been a Federal crime. I immediately wrote to the Court and to the defendants and their attorney and to the State Police Barracks at Ferndale.

The defendants in their supporting affidavits claim that they have the right to question and talk to any witness. There is a big difference here. I was informed that defendants were in State Police uniforms and tried to get William Welch to the State Police Barracks at Ferndale. There is no legal basis for defendants to seek an affidavit while in State Police outfits which pertains to their personal liability and actions. The combination of police

uniforms, police barracks and police pressure is totally different from other investigatory actions. It constitutes police pressure and the fact that Mr. Welch refused to go to the State Police Barracks and to sign an affidavit is per se proof that police pressure was being exerted against him to give an affidavit of facts which he did not wish to make.

Mr. Welch did not have to go to the State Police Barracks or to sign any affidavits. In view of my telephone conversations with Mr. Welch, such an affidavit could not truthfully support the State Police defendants.

In a footnote at the bottom of Page 7 of the Greenwald affidavit and apparently not a part of the affidavit, he states that my letter of March 26, 1976 shows that I may be obstructing justice by seeking or encouraging Mr. Welch not to testify. There seems to be some hesitancy on the part of Mr. Greenwald to make such allegation in his affidavit and is a part of the scheme to raise some sort of cloud.

I would always advise a person not to commit perjury. I promptly notified the Court.

The idea that Mr. Welch had to "testify" is absurd. It does not embrace a star chamber taking of an

affidavit at a State Police Barracks by or with the defendants. There was no Court or Judge nor was plaintiff or his counsel present.

In the history of Mr. Bellows vis-a-vis the State Police I have consistently refused any form of cooperation because of my immense suspicion of the integrity of the State Police. The taking of such an affidavit from an unwilling witness falls into the prior pattern when the State Police secured a false affidavit from one Eugene Porter and so involved Mr. Bellows in a burglary. The affidavit was false and Mr. Porter was indicted for perjury. The modus operandi herein had a familiar tone, or more accurately, a familiar odor.

Mr. Greenwald also seeks to put me on <u>voir dire</u>. I have statedthe facts as they occurred. I would testify precisely as alleged herein.

The presence or absence of William Welch as a witness or the efforts of the plaintiff to get him to attend are irrelevant and immaterial because it does not relate to any of the facts of the case.

The defendants have presented a mirage to create something suspicious and to divert the attention of the Court. If the cross-examination of Mr. Bellows had been handled more effectively, it would have inquired into the

efforts of Mr. Bellows to locate Mr. Welch. There is no issue that Mr. Bellows contacted Mr. Welch and asked him to attend. There is no issue of perjury left.

IN REPLY TO PART III, RE,
AMOUNT OF VERDICT.

The defendants contend that the verdict is excessive because the injuries were not too serious and the detention of plaintiff was brief. The jury had such evidence before it and fixed the damages.

It is not for the defendants to buy the right to seize plaintiff and punch him at will for a cheap price. That theory would justify anyone assaulting another and for a modest fee have the right to beat up another person as long as there were no broken bones or permanent physical injuries.

This case was brought to recover damages for the denial of the plaintiff's civil rights and not for assault or false arrest.

The defendants acted with malice.

On the trial counsel for defendants cited §140.20 of the N.Y. Criminal Prodedure Law to justify their release of the plaintiff without taking him before a Court or Judge. That section directed that the police immediately

release anyone taken into custody where the evidence is insufficient to support a criminal charge. The section does not give immunity. It directs immediate release. There was no probable cause to believe any crime or offense had been committed and defendants had to release plaintiff.

The release of plaintiff constituted conclusive evidence that there was no basis for the arrest in the first instance.

The defendants cannot defend that there was probable cause and such wanton and reckless exercise of police power is per se malicious.

The Court submitted specific questions in writing to the Jury and asked for a finding of damages on each item and for punitive damages.

The Jury answered each question as submitted.

The damages were to be fixed for the trauma suffered by plaintiff.

At Page 9 of the A. Seth Greenwald affidavit he states plaintiff merely sat unrestrained in the police car for 5-10 minutes. The jury apparently did not believe that testimony.

The Jury found that punitive damages were to be granted and found $3,000.00 against defendant Dainack, and only $2,000.00 against Van Houten.

The plaintiff said Dainack hit him and had seized his collar and pulled him forward. Hence the larger amount of punitive damages against defendant Dainack. The verdict was intelligent.

The defendants are not charged for any acts which were committed against plaintiff by other policemen. The verdict covers what the defendants did.

If defendants had broken plaintiff's bones and mutilated him, the verdict would have been much larger. In judging damages, it is reasonable to ask what damages any reasonable person would want under similar circumstances.

The award was not excessive.

IN REPLY TO STAY PENDING APPEAL

Rule 62(b) F.R.C.P. provides for a stay pending appeal.

Rule 62(b) permits a stay only pending disposition of a motion under Rule 59. The present motion is made under Rule 59.

An appeal can only be stayed by the filing of a supersedeas bond. No appeal has been taken and such issue is not before this Court at this time.

The request for a stay should be denied.

REQUEST FOR COUNSEL FEES

The complaint requests an award of counsel fees for plaintiff. That issue is not for the jury and should be decided by the Court.

Counsel fees in the sum of $4,500.00 should be granted and included in the bill of costs.

I prepared all the pleadings and papers herein; prepared papers for the appointment of the Sheriff of Sullivan County to make service of process; prepared interrogatories; attended deposition taken by defendants in New York City; attended and tried case on two days on March 22 and 23, 1976; attended a pre-trial conference in New York City; traveled to and from New York City for such attendance; correspondence; preparation for trial; preparation of the opposing papers herein. I estimate that more than 65 hours of time were devoted to this matter and that the reasonable value of such services is $4,500.00.

I have not taxed costs as yet and I would include such counsel fees as the Court may fix.

DEFENDANTS' CLAIMS ARE BY APPEAL

The defendants attack the rulings of the Court and the verdict by motion. The relief they seek can only

be had by appeal except as to the issue of the amount of the verdict.

My recollection of the defendants' motions at the close of the trial after the jury rendered its verdict, that the Court denied the motions to set the verdict aside and said that it would entertain a motion as to the amount of the verdict.

The present motion is therefore untenable except on the issue of damages.

The statements herein apply to the opposing affidavits of Dennis Dainack and Brian Van Houten served herein by defendants as part of their motion.

WHEREFORE, I respectfully submit that the motion of the defendants be in all respects denied, and that an award of counsel fees in the sum of $4,500.00 be made to plaintiff for counsel, together with such other relief as may be just and proper.

GEORGE H. ROSEN

Sworn to before me this
8th day of April, 1976.

WILLIAM C. ROSEN
Notary Public, State of New York
Qual. in Sullivan Co. #1060
Reg. No. 538647050
Comm. Expires March 30, 1977

Notary Public

PLAINTIFF'S AFFIDAVIT
IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

OPPOSING AFFIDAVIT

73 Civ. 1189
(MEL)

- X

STATE OF FLORIDA)
COUNTY OF VOLUSIA) SS.:

VINCENT J. BELLOWS, being duly sworn, deposes and says that I am the plaintiff in the within action.

I make this affidavit in opposition to the defendants' motion for a new trial or to reduce the damages awarded by the jury.

The allegations made by A. Seth Greenwald, attorney for the defendants, that I committed perjury are false.

I testified that I could not locate William Welch to bring him as a witness. William Welch had agreed to attend as a witness in my behalf. I had arranged to pick him up at the Robin Hood Diner in Livingston Manor at 6:00 A.M. on Monday, March 22, 1976.

I went to the Robin Hood Diner with David Miller. I picked up David Miller earlier and when we got to the Robin Hood Diner we could not locate William Welch.

PLAINTIFF'S AFFIDAVIT
IN OPPOSITION

I was instructed to be in the Federal Court in New York City at 10:00 A.M. The distance was about 110 miles plus mileage in New York City.

I left the Robin Hood Diner with David Miller and arrived at the Court Room in the Federal Court House at approximately 11:00 A.M. on March 22, 1976.

I do not change my testimony in any way. I could not locate William Welch where he was supposed to meet me.

The defendants contacted William Welch and tried to get him to go to the State Police Barracks at Ferndale. He refused to go and sign any affidavit.

Instead, he called me and told me about the efforts of the defendants, Dainack and Van Houten, to get him to sign an affidavit. I immediately called my attorney, George H. Rosen, and told Mr. Rosen that the defendants were trying to get a false affidavit. I asked William Welch to talk to Mr. Rosen and he took the telephone and told Mr. Rosen that the State Police (Dainack and Van Houten) tried to get him to sign an affidavit and he had refused to do so.

The efforts of the defendants to set aside the verdict is understandable but the police tactics to get an affidavit were not. I did not testify that I never could locate him.

BEST COPY AVAILABLE

PLAINTIFF'S AFFIDAVIT
IN OPPOSITION

The affidavits of Greenwald and defendants allege that I spoke to William Welch. The quotation of my testimony at Page 6 of Greenwald's affidavit states that I tried to get him. On Page 7, quoting my testimony, I said I was not able to locate Welch, and that is absolutely true. I could not locate him on Monday, March 22, 1976 at 6:00 A.M. at the Robin Hood Diner.

Mr. Rosen had requested me to bring Mr. Welch with me and I have and would follow Mr. Rosen's requests and advice if possible.

The present motion is a continuance of the harassment to which I have been subjected by the State Police and by these defendants. I live in Florida and an oral hearing would require that I attend.

I would on such oral hearing repeat and reallege the testimony I gave and which I have reasserted herein.

The present motion is an attempt to assert any contention to escape liability for the unlawful conduct and actions of the two defendants herein.

If they had wanted William Welch as a witness, they should have subpoened him. Mr. Welch is not employed by me and is not a relative of mine. I have no control over his actions and I am advised that I am not and was not under any obligation to produce him as a witness.

I would have liked to have had him as a witness and even though it would have been cumulative evidence.

The allegations of defendants' attorney at Page 13 that defendants did not hurt me too much and that they acted with "compassion" towards me are false and untrue. They acted with police disregard for my rights as though they were the "law" and could do whatever they wanted with me.

I called to my friends to call my lawyer and I promptly called my lawyer when they released me.

I made a formal complaint to the State Police about the acts of defendants and there was the usual "whitewash". To put it mildly, to expect that State Police officers will investigate other State Police officers and find for a citizen is absurd.

I started this action in the Federal Court so that my rights could be adjudicated by a Court and Jury and not in the State Courts where the actions of State Police enjoy a form of procedural immunity no matter what they do.

The damages, compensatory and punitive, were fully supported by the evidence. The assertion of defendants' counsel that the damages were excessive is to be expected.

The jury saw the witnesses, they saw the defendants and heard their testimony. That testimony was fantastically incredible and the jury would not accept it. The present

motion seeks to substitute the Court's fixation of the damages for the jury verdict.

I do not doubt that the Court would be fair but I was entitled to a jury trial. If I lost, the defendants would vigorously contend that the verdict was binding on me. Now that the verdict is in my favor, the defendants want to set the verdict aside and speculate on the outcome of another trial.

In addition, the defendants present the inconsistent contention that the Court reduce the verdict if it does not grant a new trial.

The burden of proof is on the plaintiff but the burden of proof of the defense is on the defendants.

The Court left it to the jury to assess the damages for the denial of my civil rights. The fixation of such damages embraced the trauma caused by my arrest and mistreatment.

If the verdict of the jury were altered it is equivalent to a denial of my right to a jury trial. That right to a jury trial does not give a procedural right to have a jury hear the evidence. If the verdict is not effective, then a jury trial is mere trial device having no substance.

I am aware that the Court has power to see justice done but the exercise of such power as to a jury verdict

must be carefully applied to prevent the substitution of the Court's judgment, no matter how fair, for the verdict of the jury.

I was placed in jeopardy because I did not know what the defendants were going to do to me. The fact that they released me after about 10 or 15 minutes is no credit to them. They lost the nerve to do what they probably intended to do to me.

The Court would be faced with a serious task to fix what it might estimate the amount of the damages to be. The jury rendered its verdict and I respectfully submit that the Court deny the defendants' motion in all respects.

If defendants have any claim of error, it should be asserted by appeal and not by a motion to set the verdict aside or to reduce the verdict. None of the allegations of the moving papers warrant the relief sought.

I further request that the Court fix and allow counsel fees in the sum of $4,500.00 to my attorney as a part of the bill of costs to be taxed.

WHEREFORE, I respectfully request that the Court deny the motion of the defendants in all respects, and that the Court fix the fees and allowances of my attorney in the

sum of $4,500.00 to be taxed as part of the costs in this action.

VINCENT J. BELLOWS
VINCENT J. BELLOWS

Sworn to before me this
9th day of April, 1976.

DIANE HINTON
Notary Public

Notary Seal Notary Public, State of Florida at Large,
My Commission Expires July 23, 1977

PLAINTIFF'S AFFIDAVIT
IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

AFFIDAVIT

73 Civ. 1189
(MEL)

- X

STATE OF NEW YORK)
COUNTY OF SULLIVAN) SS.:

DAVID MILLER, being duly sworn, deposes and says:

That I live at Livingston Manor, Sullivan County, New York.

I was a witness on behalf of the plaintiff in the above entitled action on March 22, 1976, in the United States District Court before Hon. Morris E. Lasker, United States Federal Judge.

On Monday, March 22, 1976, I travelled with Vincent J. Bellows to attend the trial.

An arrangement had been made to meet William Welch at 6:00 A.M. at the Robin Hood Diner located on Old Route 17, Livingston Manor, New York.

I went with Vincent J. Bellows to the Robin Hood Diner and William Welch was not there at that time. We waited a while and had to leave in order to be in Court on time.

PLAINTIFF'S AFFIDAVIT
IN OPPOSITION

Due to delays in traffic, we were late by almost one hour in arriving in Court.

Our arrangement had been to pick up William Welch and bring him with us to Court, and his absence at the time and place indicated required that we proceed to the Court House in New York City.

William Welch had told me that he would be happy to testify on behalf of the plaintiff. I had spoken to him prior to the trial and I called Mr. Rosen on the telephone and informed him that William Welch would appear as a witness. William Welch then took the phone and spoke with Mr. Rosen and I heard William Welch say that he would be happy to attend as a witness for the plaintiff. The telephone conversation took place in the early part of March, 1976.

/s/
DAVID MILLER

Sworn tobbefore me this
5th day of April, 1976.

ROBERT M. ROSEN
Notary Public State of New York
Qual. in Sullivan Co. #901
Reg. No. 53-3343935
Commission Expires March 30, 1977

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.
----------X

73 Civ. 1189

MEMORANDUM

APPEARANCES:

ROSEN & ROSEN, ESQS.
265 Broadway
P. O. Box 348
Monticello, New York 12701
Attorneys for Plaintiff
Of Counsel: GEORGE H. ROSEN, ESQ.

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047
Attorney for Defendants
Of Counsel: A SETH GREENWALD, ESQ.
Assistant Attorney General

MEMORANDUM DECISION ON MOTION
TO SET ASIDE VERDICT

LASKER, D.J.

Defendants move for an order pursuant to Rule 59 of the Federal Rules of Civil Procedure, to set aside the verdict of the jury, or to grant a new trial, or in the alternative to set aside or reduce the verdict of the jury as excessive.

I. The Jury Charge

The defendants contend that the jury was charged to find a violation of state law, but that not every violation of local law amounts to deprivation of a federal right secured by the Constitution. However, the jury was not charged as to false imprisonment or other state torts, but as to the pertinent portion of the New York State Criminal Procedure Law, which, they were instructed, satisfies the Constitution. As stated in Mueller v. Powell, 203 F.2d 797, 800 (8th Cir. 1953) (civil rights action against state officers for arrest and detention without a warrant):

> "If the procedure prescribed by the State actually affords the character of due process contemplated by the federal constitution, and is followed, there is no denial of the right under the federal Constitution. While if it does not, or is not followed, the right has been violated. Smith v. State of Texas, 311 U.S. 128; Hill v. State of Texas, 316 U.S. 400."

See Street v. Surdykee, 492 F.2d 368 (4th Cir. 1974).

The defendants rely on Paul v. Davis, 44 U.S.L.W. 4337 (1975) which they claim holds that a violation of local law does not necessarily mean that federal rights have been invaded. That case is inapposite since there the Supreme Court held only that a defamation claim, because it is not based on the Constitution and implicates no federally protected rights, cannot be the basis of a civil rights action. Here, a claim of illegal arrest and detention implicated the "liberty" guarantees of the Due Process Clause.

The defendants also claim that the charge erroneously placed the burden of proof as to the propriety of the arrest on the defendants. This is not so: the substantive portions of the charge began by instructing the jury as to what the plaintiff was required to prove, including the occurrence of the arrest and the use of force by the defendants. (Defendants' Affidavit, Charge at 6)

The defendants contend that "the charge denied the defendants a good faith defense by splitting the arrest from the performance of same (by alleged force)." The claim lacks merit. As the charge to the jury points out, the defendants denied that physical force occurred and accordingly introduced no evidence to establish that, if force was used, it was reasonable. As a result, there was no occasion to present the question of the good faith use

of force to the jury.

II. Prejudicial Testimony

The defendants argue that the admission of testimony as to the plaintiff's prior arrests and his alleged "crying" in the police car was prejudicial. However, the defendants opened the door to this testimony by introducing evidence that plaintiff had cried, and in any event the court limited consideration of this testimony to the issue of the credibility of defendants. It cannot be said that the prejudicial impact of the testimony, if any, outweighed its probative value.

III. Alleged Perjury by the Plaintiff

The defendants claim that the plaintiff perjured himself when he testified that he was unable to locate William Welch, a witness to the arrest. According to the defendants' affidavits, on March 26, 1976, four days after the trial, Welch informed the defendants that he had seen and spoken with the plaintiff on two occasions just prior to the trial.

In his affidavit, the plaintiff asserts that he had arranged to pick up Welch the morning of the trial but that Welch had failed to appear. The plaintiff asserts that when he testified that he could not "locate" Welch, he was referring to Welch's failure to meet him before the

trial. The plaintiff's version of the events that took place on the morning of the trial is corroborated by the affidavit of a David Miller.

Assuming arguendo that the testimony was perjurious -- and the plaintiff's affidavits rebut that contention -- the defendants are nevertheless not entitled to a new trial under Rule 59 of the Federal Rules of Civil Procedure since the newly discovered evidence bears only on the plaintiff' credibility, not on the substantive issues:

> "Evidence, therefore, that is merely cumulative, or whose only effect is to contradict or attack the credibility of witnesses will ordinarily not warrant a new trial, in the absence of very unusual or extraordinary circumstances." 6A Moore's Federal Practice ¶59.08[3], (1974).

See Baynum v. Chesapeake & Ohio Ry., 456 F.2d 658, 662 (6th Cir. 1972).

Accordingly, the defendants are not entitled to a hearing to establish the alleged perjury and their motion under Rule 59 is denied.

IV. Excessiveness of Verdict

Defendants claim that, since there was no evidence of physical injury, and since the total time of detention was 5 - 10 minutes, the award of $12,000. in compensatory damages was excessive. Further, defendants argue, failure to charge that the jury might award nominal damages was in

error. Punitive damages were inappropriate, it is contended, because the defendants were not acting in a "malicious" or "overbearing" manner; rather, "compassion was shown to plaintiff by voluntarily releasing him after 5-10 minutes in the car."

The award of punitive damages was proper in light of the nature of the defendants' conduct. There was sufficient testimony from which the jury could have found the malice required for awarding punitive damages. See Gill v. Manuel, 488 F.2d 799, 801 (9th Cir. 1973). However, the award of $12,000. in compensatory damages was excessive since the actual physical or emotional harm to the plaintiff appears to have been nominal.

V. Attorney's Fees

The plaintiff seeks an award of counsel fees in the sum of $4,500. However, Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) bars such an award where, as here, the statute on which the claim is based fails to provide for attorney's fees.

For the reasons stated above, the defendants' motion is granted to the extent of granting a new trial unless the plaintiff will accept an award of compensatory damages against the defendants in the amount of $4,000. and punitive damages in the amount of $3,000. against the defendant Dainack and $2,000. against the defendant Van Houten,

and in all other respects is denied.

Submit order on notice.

Dated: New York, New York
July 27, 1976.

MORRIS E. LASKER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

VINCENT J. BELLOWS, :

Plaintiff, : COUNTER-ORDER

-against- : 73 Civ. 1189 (MEL)

DENNIS DAINACK and BRIAN VAN HOUTEN, :

Defendants. :

----------X

Defendants having moved to set aside the verdict and, in the alternative, to reduce damages as awarded by the jury after trial,

NOW upon all the prior proceedings and the decision of the District Court dated July 27, 1976, it is hereby

ORDERED that the defendants' motion is granted to the extent of granting a new trial unless the plaintiff will accept an award of compensatory damages against the defendants in the amount of $4,000 and punitive damages in the amount of $3,000 against defendant Dainack and $2,000 against defendant Van Houten and in all other respects denied and it is further

ORDERED that the judgment upon this order be stayed pending timely filing of a notice of appeal and docketing thereof.

Dated: New York, New York
August 19, 1976

MORRIS E. LASKER
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

- X

ACCEPTANCE OF AWARD OF DAMAGES AS REDUCED

73 Civ. 1189 (MEL)

S I R :

PLEASE TAKE NOTICE that the Plaintiff, Vincent J. Bellows, ACCEPTS the verdict as reduced by the Court to the sum of $4,000.00 for compensatory damages and $3,000.00 for punitive damages against the defendant Dennis Dainack, and for $2,000.00 for punitive damages against the defendant Brian Van Houten.

Dated: September 1, 1976

Yours, etc.

ROSEN & ROSEN

Attorneys for Plaintiff,
Office and P.O. Address,
265 Broadway, P.O. Box 348,
Monticello, New York 12701

Tel: 914-794-7733

TO: LOUIS J. LEFKOWITZ, ESQ.,
Attorney General,
(A. Seth Greenwald, Esq.,
Assistant Attorney General),
Attorney for Defendants,
Two World Trade Center,
New York, N.Y. 10047

ACCEPTANCE

TO: CLERK OF THE UNITED STATES
DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK,
United States Court House,
Foley Square,
New York, N.Y. 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VINCENT J. BELLOWS,

Plaintiff,

73 Civil 1189 (MEL)

-against-

DENNIS DAINACK and BRIAN VAN HOUTEN,

Defendants.

JUDGMENT

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The issues in the above entitled action having been brought on regularly for trial before the Honorable Morris E. Lasker, United States District Judge, and a jury, on March 22 and March 23, 1976, and the title having been amended during trial, and the Court having submitted questions for the jury, and the jury having answered the said questions, and the jury thereafter having returned a verdict in favor of the plaintiff against the defendants DENNIS DAINACK and BRIAN VAN HOUTEN, in the amount of $12,000.00 for compensatory damages, jointly and severally, and against the defendant DENNIS DAINACK, in the amount of $3,000.00 for punitive damages, and against the defendant BRIAN VAN HOUTEN, in the amount of $2,000.00 for punitive damages; and the defendants having thereafter moved to set aside the said verdict and/or reduction of the amount of damages awarded by said jury, and the Court having denied the motion

to set aside the verdict, and having granted a reduction of the damages awarded by the said jury to the amount of $4,000.00 against the defendants for compensatory damages, and for punitive damages in the amount of $3,000.00 against the defendant DENNIS DAINACK, and in the amount of $2,000.00 against the defendant BRIAN VAN HOUTEN, and having denied the said motion in all other respects, and upon condition that the plaintiff accept the award of damages as reduced by the Court, and the plaintiff having duly filed an acceptance of the said award of damages as reduced by the Court; it is

ORDERED, ADJUDGED AND DECREED; That VINCENT J. BELLOWS, of 1235 Sunset Circle, Daytona Beach, Florida, have judgment against the defendants DENNIS DAINACK and BRIAN VAN HOUTEN, both residing in the County of Sullivan, State of New York, in the amount of $4,000.00, for compensatory damages, jointly and severally; and it is further

ORDERED, ADJUDGED AND DECREED: That said plaintiff VINCENT J. BELLOWS have judgment against the defendant DENNIS DAINACK in the amount of $3,000.00 for punitive damages; and it is further

ORDERED, ADJUDGED AND DECREED: That the said plaintiff VINCENT J. BELLOWS have judgment against the

JUDGMENT

defendant BRIAN VAN HOUTEN in the amount of $2,000.00 for punitive damages.

Dated: New York, N.Y.
September 21, 1976

/S/ RAYMOND F BURGHARDT
CLERK

APPROVED:

/S/ MORRIS E. LASKER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

VINCENT J. BELLOWS,

Plaintiff,

-against-

DENNIS DAINACK and BRIAN VANHOUTEN,

Defendants.

NOTICE OF APPEAL

73 Civ. 1189 (MEL)

----------X

S I R S :

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1291, that the defendants hereby appeal to the United States Court of Appeals for the Second Circuit from a judgment entered September 22, 1976 in the above action and this appeal is taken from each and every part of the judgment.

Dated: New York, New York
October 20, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants
By

A. Seth Greenwald

A. SETH GREENWALD
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3396

TO: CLERK
United States District Court
United States Courthouse
Foley Square
New York, N.Y. 10007

ROSEN & ROSEN, ESQS.
265 Broadway
Box 348
Monticello, N.Y. 12701

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellants herein. On the 14th day of January , 1977 , she served the annexed upon the following named person :

ROSEN & ROSEN, ESQS.
Attorneys for Plaintiff-
Appellee
265 Broadway
P.O. Box 348
Monticello, New York 12701

Attorneys in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Magdaline Sweeney

Sworn to before me this
14th day of January , 1977

Emanuel McKay
Assistant Attorney General
of the State of New York